

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-1274

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

WINCEL HENDRIX,

Appellant.

B
P/S
Docket No. 74-1274

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether there are any non-frivolous issues which
can be presented on appeal to this Court.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Constance Baker Motley) rendered on February 21, 1974, after a jury trial, convicting Wincel Hendrix of conspiracy to distribute heroin, in violation of 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846, and of distribution of heroin, in violation of 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 18 U.S.C. §2. Appellant was sentenced to imprisonment for a term of three years and to special parole for a term of five years on each count, the sentences to run concurrently.

The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal,* pursuant to the Criminal Justice Act.

Statement of Facts

Appellant, along with co-defendants Gerald Gavin and John Turner, was accused of participation in a scheme to sell heroin. The Government's principal witnesses at trial were Ronald Clayton, an undercover agent who posed as a buyer of narcotics, and co-defendant Turner, who acted as the intermediary between Clayton and appellant.

*Appellant was represented at trial by R. Marvin McKeller, Esq.

Clayton, an investigator for the Ocean County, New Jersey, Narcotics Bureau, testified that on January 4, 1973, he met Turner in Lakewood, New Jersey, to ask Turner to obtain heroin (10*). Turner, unable to reach his New York contacts by telephone, told Clayton to return the next day (11). On January 5, Clayton met Turner, who succeeded in setting up a deal over the telephone for one ounce of heroin (11).

Later that day Clayton drove Turner to Manhattan where, by prearrangement, they met undercover agent Kenneth Bernhardt of the Joint Task Force, who, posing as the ultimate buyer of the heroin, gave Clayton \$1,200 to make the purchase (12-14). Clayton and Turner then proceeded to Apartment 12-H at 415 East 105 Street, where the sale was to occur (15).

Outside the apartment, Clayton noticed undercover agent Lex Henderson of the Drug Enforcement Administration, who was acting as a surveillance agent (15).

Clayton and Turner were admitted to the apartment by co-defendant Gavin, who inquired about the size of their purchase, then made a telephone call to place the orders (16-18). When Gavin said that the supplier would arrive in fifteen to twenty minutes, Clayton went downstairs, ostensibly to purchase beverages, and consulted Bernhardt (19).

Upon leaving the elevator on his way back to the

*Numerals in parentheses refer to pages of the trial transcript (December 19, 1973, 2:00 p.m.-December 20, 1973) and the sentencing hearing (February 21, 1974).

apartment, Clayton noticed that two black men had also left the elevator and were heading toward the same apartment (20). One of those men, later identified as appellant, asked Clayton, "What do you want?" When Clayton responded that he was bringing beverages, appellant apparently recognized that Clayton was at the apartment with Turner. Appellant then unlocked the door with a key (20).

Once inside the apartment, appellant immediately went to a back room from which, several minutes later, he called for Turner (21-22). Turner met with appellant and soon reappeared to get the money from Clayton (22). Turner then went again to the back room and returned with the heroin (22). Turner gave the heroin packet to Clayton (22). Gavin then let Clayton and Turner out of the apartment (23). On the street, Clayton gave the packet to Bernhardt. He then drove with Turner to New Jersey (24).

Turner testified to the same facts as Clayton had. In addition, he was able to identify appellant as the man who sold him the heroin in the back room of the apartment (101-137).*

Following the close of the Government's case, defense counsel, noting that Henderson and Turner, but not Clayton, had testified before the grand jury, sought to have Judge Motley examine the grand jury proceedings to determine whether the

*Also testifying for the Government were surveillance agents Bernhardt (94-100) and Henderson (140-58).

grand jury had been deceived into believing that Henderson was giving a first-hand account of the transaction rather than a hearsay account related to him by Clayton (172-73). Judge Motley denied the motion on the ground that, regardless of Henderson's representations, Turner's testimony supplied the grand jury with an eye-witness description of the events (193).

Appellant testified in his own behalf. He maintained that he was home in Corona, Queens, on the night of January 5, 1974, that he had moved from 105th Street, Manhattan, to Queens in November 1973, that he allowed an acquaintance named "Joe" to stay in the Manhattan apartment, and that he had never met Clayton and had met Turner only once two years previously (225-28).*

After deliberation the jury found appellant guilty as charged.

*Appellant's assertions were corroborated by Gavin, who testified that he saw appellant in Queens early in the evening and that appellant was not at the Manhattan apartment that night (198-208).

POSSIBLE ISSUES ON APPEAL

The only possible issue on appeal is whether Judge Motley improperly denied defense counsel's motion, made at the close of the Government's case, for inspection of the grand jury minutes to determine whether the grand jury had been deceived into believing that Agent Henderson was testifying from eye-witness experience. Counsel urged the Judge to inspect the minutes because Henderson, the only agent to testify before the grand jury, had merely acted in a surveillance capacity.

Judge Motley properly denied defense counsel's motion. She noted that, unlike the situations in United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972), and United States v. Ramirez, 482 F.2d 807 (2d Cir. 1973), the grand jury here received valuable eye-witness testimony from co-defendant Turner. Turner specifically identified appellant as the man who sold him the heroin he passed on to Agent Clayton. Thus, regardless of the nature of Henderson's knowledge of the crimes, the grand jury had ample eye-witness evidence against appellant to return an indictment. Cf. Costello v. United States, 350 U.S. 359 (1956).

Moreover, questions based upon Henderson's grand jury testimony asked of him by counsel for co-defendant Gavin demonstrate that the grand jury was aware of the hearsay nature of the testimony:

Q. Well do you recall, sir, on June 20, 1973, being asked this question by the Assistant U.S. Attorney presenting the case to the

grand jury and giving this answer:

"Q Did the undercover agent tell you that he and Mr. Turner were admitted to the apartment by a young black male, age 21, later identified as Jerry Golden, and they went to a living-room where other people were seated?

"A. Yes, sir."

A That's correct..

Q You were asked that question and you gave that answer?

A That's correct, yes.

Q Now, sir, the undercover agent referred to that question, that was Mr. Clayton, was it not?

A Yes, sir.

Thus, Henderson explicitly notified the grand jurors that he was giving facts relayed to him by another agent.

CONCLUSION

For the above-stated reasons, The Legal Aid Society, Federal Defender Services Unit, should be permitted to withdraw as counsel for appellant for purposes of this appeal.

Respectfully submitted,

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